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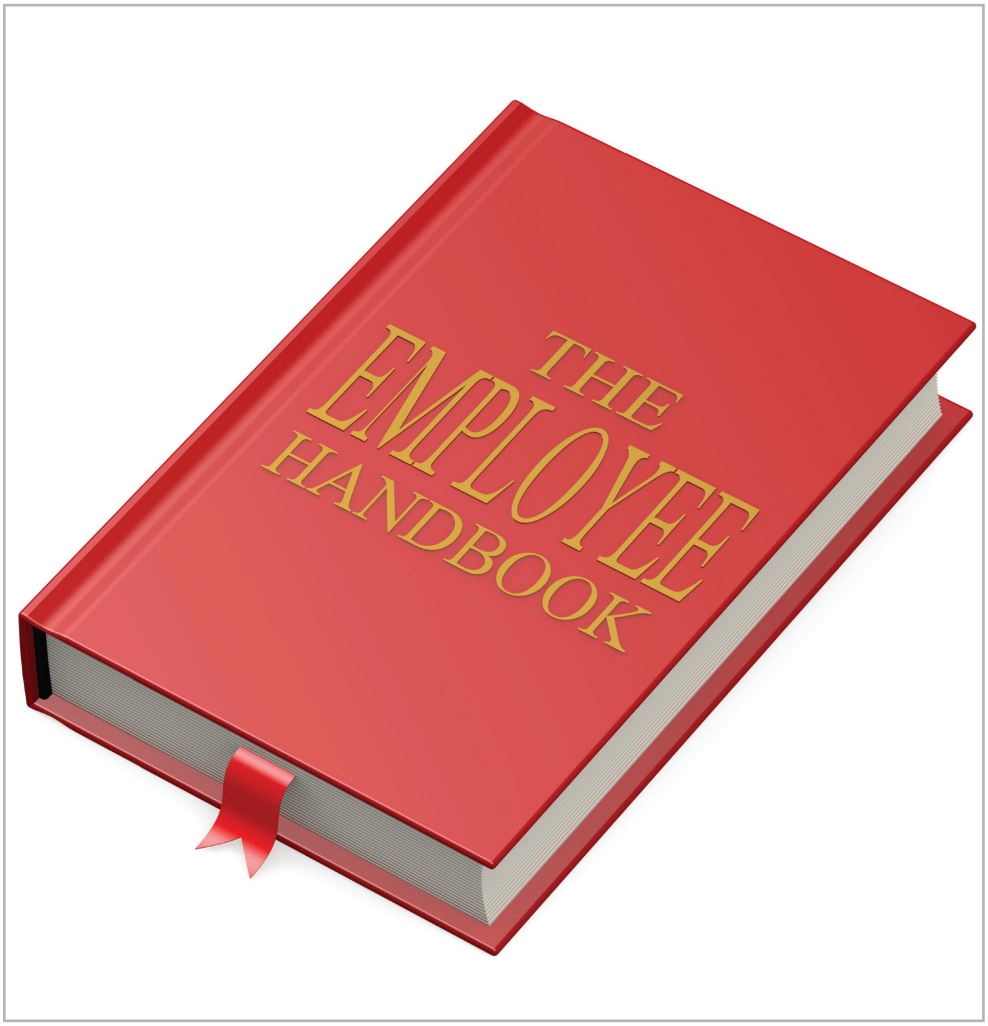

NEW YEAR, REVISED HANDBOOK

By Nicole Elemen

Now that you know all about the new employment laws in California for 2016—see our *Employment Law Commentary* from last month—it's time to think about revising your employee handbooks and personnel procedures for the New Year. Here are the top 7 California employee handbook and personnel procedure changes to make for 2016.

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1. Family and Medical Leave Policy for California Family Rights Act Leave

On July 1, 2015, the California Family Rights Act ("CFRA") implementing regulations were significantly revised. The changes relevant to your family and medical leave/CFRA policy include a shortened time to respond to requests for leave (now 5 days), revisions to the definition of "inpatient care," which constitutes a serious health condition; an explicit obligation to reasonably accommodate disabilities pursuant to the Fair Employment and Housing Act ("FEHA"), notice of changes to the 12-month period; calculating the workweek for employees with varying work schedules; and excluding holidays from the 12 weeks of leave.

Here are the revisions we recommend for your family and medical leave/CFRA policy and procedures:

- Your policy and procedures must ensure that employees' receive a response to their request for leave no later than 5 days from the date the request is received by the employer.
- If your policy defines "inpatient care," be sure it includes not only when a person stays at a health care facility overnight, but also when a person is admitted for an overnight stay but is later discharged before staying overnight.
- In the return to work or request for additional leave section of your policy, include a statement that requests for additional leave for an employee's own serious health condition will be treated as a request for disability accommodation in accordance with reasonable accommodation policy. Ensure your procedures include engaging the employee in the interactive process to determine whether additional leave constitutes a reasonable accommodation under FEHA.
- If you change the fixed 12-month period, *i.e.*, from a calendar year to a "rolling" 12 month period measured backward from the first date leave begins, be sure to issue a notice to employees at least 60 days in advance and include a copy of your revised policy.
- Required overtime hours may be counted against an employee's 12 weeks of leave, *i.e.*, employees who are scheduled to work over 8 hours in a day or over 40 hours in a week. However, voluntary overtime hours may not be included.
- If you have employees who work varying hours each workweek, to calculate how many hours of leave make up their 12 weeks of CFRA leave, use the weekly average of hours scheduled over the 12 month period prior to the leave to determine the employee's leave entitlement. Similarly, the number of workdays included in the 12 weeks of CFRA leave should also be based on the number of days per week the employee is normally scheduled.
- Do not count holidays as part of an employee's 12 weeks of leave unless the employee would have been required to work on the holiday. For example, if you have an office shutdown on a holiday, these days should not be counted against an employee's 12 weeks of CFRA leave.
- Your policy and procedures cannot require employees to complete a fitness-for-duty examination as a condition of an employee's return from CFRA leave.
- Your procedures may now include retroactive designations of leave as CFRA leave so long as you provide "appropriate notice" and the designation "does not cause harm or injury to the employee."
- Your procedures should only permit contacting a health care provider to authenticate a medical certification for CFRA leave for an employee or the family member of an employee. Contacting a health care provider for any other reason is prohibited, although you may request a second opinion if you disagree with the certification.
- Use the "Certification of Health Care Provider" form published in the CFRA amended Regulations at Section 11097 to obtain medical certification of the need for CFRA leave, or incorporate the language

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regarding the California Genetic Information Nondiscrimination Act of 2011, the amended definition for inpatient care, a description of intermittent or reduced work schedule leave where applicable, and ensure the certification form does not require disclosure of the underlying diagnosis without the employee's consent (which is strictly voluntary).

2. Paid Sick Leave Policy

Just days after California's Paid Sick Leave Law took effect, the law was amended. The changes were aimed to clarify the law. AB 304 clarified that employers with unlimited sick leave or unlimited paid time off policies could simply state "unlimited on wage statements." The amendment also permits employers with unlimited sick leave or unlimited paid time off policies to simply state "unlimited on wage statements." In addition, the amendment permits employers to use the "regular rate" as used for overtime pay for non-exempt employees. We recommend revising your policy and procedures as follows:

- Paid sick leave is no longer restricted to only an accrual rate of one hour for every 30 hours worked under the accrual method. Alternative accrual methods, such as 1 day/8 hours per month or 3 hours per biweekly pay period, are permissible so long as employees accrue at least 24 hours of paid sick leave by their 120th day of employment. Consider taking advantage of the flexibility in the rate of accrual by including an alternative accrual method other than 1 hour for every 30 hours worked to match the accrual intervals in which you provide vacation or paid time off.
- If you have an unlimited sick leave or paid time off policy, you can state "unlimited" as the sick leave amount on employee wage statements.
- Have payroll calculate sick leave pay using the regular rate for non-exempt employees.

3. Participation in School Activities Policy

School Activities Policy, in accordance with Labor Code section 230.8, currently provides parents with children up to 40 hours of unpaid time off to participate in their children's school or licensed childcare activities. SB 579 has expanded this provision to provide time off to grandparents, stepparents, foster parents, and those in loco parentis. The amendment also allows time off to be taken when there is an emergency at the school or childcare provider, such as a school closure, student behavior and disciplinary issues, or finding and enrolling children in a school or childcare provider, such as a daycare. We recommend revising your policy as follows:

- Change any reference to "parent" to "parent, guardian, stepparent, foster parent, or grandparent of, or a person who stands in loco parentis to, a child."
- Expand the listed school activities to include school or childcare emergencies, such as behavioral and discipline issues, unexpected unavailability, and natural disasters.

4. Disability and Religious Accommodations and Anti-Discrimination Policies

This year, the Fair Employment and Housing Act, Govt. Code sections 12940 (l)(4) and (m)(2), were amended to protect employees who request an accommodation for a disability or a religious accommodation, whether or not the accommodation is actually granted, from retaliation and discrimination. In light of this change, we recommend revising your policies as follows:

- Consider revising your disability and reasonable accommodation policies to specifically protect employees from retaliation and discrimination with a statement such as, "employees requesting accommodations will not be retaliated or discriminated against. If you feel you have been retaliated or discriminated against based on your request for accommodation, please immediately inform your supervisor, any other manager whom you are comfortable speaking with or Human Resources at [Insert Contact Information]."

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- Revise your anti-discrimination or equal employment opportunity policy to add individuals requesting disability or religious accommodations as a protected class.

5. Protections for Employees Called to National Guard Active Duty

Military and Veterans Code section 395.06 has been amended to provide job protection for California employees called to active National Guard duty in *any* state, where it previously only protected those called to National Guard duty in California. Accordingly, be sure to revise your military leave policy as follows:

- Ensure your policy covers all employees called to active duty by the U.S. Armed Forces, as well as employees called to active National Guard duty in any state.
- Revise your policy to provide return to work protections to employees called to active National Guard duty in any state, including the right to return to the same or similar position upon return from active duty, and protection from termination without cause within 1 year of their return to work.

6. Protections for Transgender Employees

The enforcement of laws protecting transgender employees under both California and federal law continues to increase. It is the EEOC's position that transgender employees are protected by sex discrimination laws, including Title VII. Accordingly, ensure your handbook contains sex and gender as protected classifications in your equal employment opportunity, anti-discrimination, anti-harassment, and anti-retaliation policies. In addition, review your dress code, grooming, and professional appearance policies to see if your policies are written in gender neutral terms. If not, consider whether gender identifiers are really necessary and ensure that in practice, employees are permitted to present themselves as the gender to which they identify.

7. Handbook Policies and the NLRA

This year the National Labor Relations Board ("NLRB") General Counsel issued a memorandum discussing what the NLRB considers to be lawful and unlawful employee handbook policies based on Section 7 of the National Labor Relations Act ("NLRA"), which affords employees the right to engage in protected concerted activities (the "Memo"). Section 7 rights apply to all employees, whether or not they are part of a union. However, while enforcement of NLRA rights in non-unionized workforces tends to be low, it does occur. It should also be noted that some of the NLRB's decisions are also being challenged in the courts. The types of policies that the NLRB took issue with include confidentiality, employee conduct, communications with third parties, use of logos, copyrights and trademarks, restrictions on photography and recording devices, conflicts of interest, and social media policies. Based on this guidance, we recommend reviewing your employee handbook policies for the following issues:

- Confidentiality. While the NLRB acknowledges an employer's right to restrict the disclosure of its confidential information, confidentiality policies that broadly restrict employees from discussing "employee information," including phone numbers and addresses, confidential information about other employees, disclosure of "another's" confidential information, disclosing conversations meant to be private, and disclosing details about the employer, were all found to be unlawful under the NLRA. The policies were deemed to interfere with employees' rights to discuss their terms and conditions of employment and to engage in efforts to organize. Confidentiality policies should provide context for broad prohibitions on disclosure that explain the type of confidential information, *i.e.*, not publicly known, financial data, etc., and if references to employee information and terms and conditions or employment are included, such references may be deleted or clarified to exclude activities protected by Section 7.

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- Employee conduct towards the employer. General policies that require employees to be respectful of the employer, not to make fun of, denigrate, or defame the employer, and to refrain from actions that may harm the employer's reputation were found to be unlawful, as they could be interpreted to prohibit Section 7 activity. However, policies which require employees to be respectful of customers and the public, work in a cooperative manner with management and others, and not be insubordinate, threatening, intimidating, or disrespectful to any manager, coworker, customer, or vendor were found to be lawful. The key is to ensure that your employee conduct policy does not infringe of the right of employees to protest and criticize employers and management, as well as the terms and conditions of their employment.

- Communications with third parties. Section 7 protects employees' rights to discuss their terms and conditions of employment in a public forum. Accordingly, the NLRB found policies that contain broad prohibitions on employees speaking to the media or government agencies to be unlawful. However, policies that prohibit employees from speaking on behalf of the company employer without authorization were found to be lawful. Accordingly, review your policy to ensure employees would not think that they are prevented from speaking to the media about the terms and conditions of their employment, and only limit speaking *on behalf of* the company.

- Use of logos and trademarks. Policies restricting employees' use of the employer's logos and trademarks have also been found to be unlawful where broad restrictions would prohibit fair use of logos and trademarks in employees' Section 7 protected concerted activity, such as written communications between employees. However, policies that restrict infringement on logos, trademarks, and intellectual property of the employer, as well those requiring employees to respect all copyrights, trademarks, and intellectual property laws, were found to be lawful. Accordingly, check your policy to see if it restricts fair use of your company's logos, copyrights, and trademarks.

- Restrictions on photography and recording devices. Policies that have blanket restrictions on the use of photography and recording devices, such as smart phones in the workplace, were found to be unlawful since they infringed on employees' rights under Section 7 to document unfair labor practices. However, policies that gave specific context, such as those that prohibited use of these during working time or those that restrict photos and recordings to protect customer/client privacy, as well as intellectual property, copyrights, and trademarks, have been found to be lawful. We suggest reviewing your policy to ensure it explains why the restrictions are needed.

- Conflicts of interest. Conflicts of interest policies that contain broad prohibitions on actions "not in the best interest" of the employer, and conflicts between personal interests and those of the employer, were found to violate the NLRA. Consider providing specific examples of conflicts you seek to prevent to give context to the broad prohibitions, such as prohibitions on outside activities with persons or entities that compete with, are clients of, or vendors with the company, including accepting gifts from, being employed with, or obtaining a financial interest in such an entity.

- Social media. Broad policies that prohibit employees from speaking about their employer on social media at all or from speaking negatively about their employer were found to violate Section 7 of the NLRA. However, policies that prohibit negative comments about customers/clients and creating blogs or other social media about the employer with an explicit exception for protected activity under Section 7, as well as restrictions on harassing, libelous, slanderous, or defaming conduct on social media, and making knowingly false representation about an employee's own credentials related to work were found to be

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lawful. Accordingly, ensure that any policies restricting employees' social media activity do not restrict social media postings about the company in violation of Section 7.

The Memo also discusses the lack of explicit exceptions for employee activities protected by Section 7 of the NLRA. Accordingly, we recommend including in the introduction to your handbook, and possibly again in the section listed above where the scope of the policy may be broad enough to include Section 7 protected concerted activity, an explicit exception such as: "Nothing in this handbook prohibits employees from engaging in any activities protected by Section 7 of the NLRA," or "This handbook does not apply to activities protected by Section 7 of the NLRA."

Updating your employee handbooks and personnel procedures at the start of the year will set the stage for compliance with labor and employment laws in 2016. Once everything is updated, don't forget to communicate the changes to your policies and procedures to your employees.

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